No. 87-2036

In The
Supreme Court of the United States
October Term, 1988

JANET HEROLD,

Petitioner,

vs.

BURLINGTON NORTHERN, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. STANDING.

Respondent, Burlington Northern, Inc. (hereinafter "BN"), argues that Janet Herold does not have "standing" to challenge the constitutional propriety of remittiturs because she refused to accept the 85% remittitur ordered by the District Court. BN contends that Mrs. Herold would have standing if she had accepted the remittitur.[1] On the contrary,

[1]BN asserts that Mrs. Herold's constitutional challenge "might have some surface plausibility if in fact the remittitur had been accepted by Mrs. Herold and she was now complaining that it was an arbitrarily low amount." Opposition Brief, p. 3.

if Mrs. Herold had accepted the remittitur, she would have been precluded from appealing to the Eighth Circuit Court of Appeals and she definitely would not now have standing before this Court. *Donovan v. Pennsylvania Shipping Co., Inc.*, 429 U.S. 648 (1977); *Cunningham v. City of Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986).

Mrs. Herold followed the only procedure available to her for challenging the constitutionality of the remittitur practice. She refused the District Court's 85% remittitur; she attempted to cross-appeal the remittitur order which was held to be interlocutory, *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241, 1249-50 (8th Cir. 1985); she underwent the time, expense and uncertainty of a sanitized second trial; she then appealed the propriety of the original remittitur; and, she is now requesting this Court to critically examine an admittedly widespread practice which is the very antithesis of the right to trial by jury. Under these circumstances, the BN cannot in good conscience argue that Mrs. Herold does not have a "direct and substantial personal interest" in the issue before the court or that the practice of remittitur has not had an "adverse impact" on her interests.

II. PRIOR REMITTITUR DECISIONS.

The BN fails to recognize that this Court's prior remittitur decisions have not specifically addressed the constitutionality of remittiturs in a factual context such as that presented in this case. In both *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886) and *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889), the plaintiff agreed to accept remittitur and the *defendant* appealed, alleging that the remittitur practice violated a defendant's constitutional right to trial by jury. This Court, however, held that a defendant has no "cause for complaint"[2] in such a situation because it is the plaintiff who is being forced to relinquish all or part of a favorable jury verdict.

[2] *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 74 (1889).

Thus, the court did not sanction the remittitur practice when used against a complaining plaintiff and, in fact, reserved determination of that issue for another day.[3]

Since *Mann*, it does not appear that this Court has specifically answered or addressed the question left to be determined in that case. Although remittitur practice has enjoyed almost "universal" acceptance in the courts, such passive acceptance of a doctrine which "has been condemned as opposed to the principles of the common law by every *reasoned* English decision"[4] certainly does not make it constitutional. If such were the case, this country would still be governed by the doctrine of "separate but equal."[5]

III. THE PRACTICE OF REMITTITUR ACTUALLY FRUSTRATES JUDICIAL ECONOMY.

BN contends that the practice of remittitur constitutes a valuable way of avoiding "expensive, cumbersome [and] time-consuming" litigation and "unnecessary [and] repetitive jury trials."[6] If that is the case, then it is indeed ironic that because of the practice of remittitur, Janet Herold was forced to relinquish a jury verdict which was admittedly based upon

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[3]Mr. Justice Harlan implicitly acknowledged a distinction between remittiturs when applied to defendants as opposed to plaintiffs when he wrote:

> Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this court, we need not decide in the present case.

Id. at 73.

[4]*Dimick v. Schiedt*, 293 U.S. 474, 484 (1935) (emphasis in original).

[5]*Plessy v. Ferguson*, 163 U.S. 537 (1896).

[6]Opposition Brief, p. 7.

admissible evidence and the correct law;[7] she was forced to spend nearly two years attempting to have it reinstated in the Court of Appeals; she was forced to go through an expensive, time-consuming and wholly unnecessary second trial two years later;[8] and, then she had to spend another year before the Court of Appeals.

The practice of remittitur thus contributes to "judicial economy and efficiency" *only* if a plaintiff such as Mrs. Herold is willing to sacrifice her right to trial by jury for the sake of judicial expediency. If she elects to defend and protect the constitutional right of trial by jury, she is penalized, punished and beaten down by the system. It is little wonder then that rather than promoting judicial economy, the practice of remittitur actually contributes to the public perception that the judicial system is unresponsive to the public and that, as the public's representatives in the system, juries are all too often bypassed.

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[7]BN argues that the remittitur practice is an "essential counterbalance" to the actions of a "misguided" jury. Opposition Brief, p. 8. In this case, it is admitted that the original jury was properly instructed on the applicable law; that it heard only relevant, admissible and useful evidence; that BN waived final argument to the jury; and, that BN did not object to any of the evidence on the issue of loss of consortium. The use of the remittitur practice in such a case where the jury was anything but "misguided" speaks volumes as to its unconstitutionality.

[8]The second trial resulted in a $500,000 verdict whereas the District Court's remittitur would have awarded $300,000. To force a litigant to undergo a second trial in order to correct a district court's unexamined "guess" as to how a properly "guided" jury would decide the case is not a very good example of judicial economy.

CONCLUSION

The Petition for Writ of Certiorari should be granted so that the important constitutional question presented can finally and completely be examined and determined by this Court.

DATED this 22nd day of July, 1988.

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